



August 27, 2002

President Jerome H. Supple
Southwest Texas State University
601 University Drive
San Marcos, Texas 78666-4615

OR2002-4771

Dear President Supple:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167785.

Southwest Texas State University (the “university”) received a request for four categories of information pertaining to communications concerning graduate students of the requestor, as well as student evaluation comments for courses taught in the fall of 1998, the spring of 1999, and the fall of 2000. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov’t Code § 552.304 (providing that interested party may make comments stating why information should or should not be released).

Initially, we note that you have not submitted to this office, nor do you inform us that you have released to the requestor, any information responsive to the request for student evaluations. Therefore, to the extent such information exists, you must immediately release such information to the requestor if you have not already done so. *See* Gov’t Code §§ 552.006, .301(a), .302.¹

¹ We note that in Open Records Decision No 224 (1979), this office found that students’ handwritten evaluations of a university faculty member may be made confidential under section 552.114 of the Government Code. In that ruling, we stated that if “ . . . release of the student’s handwritten comments, even though they are not signed, would make the identity of the student easily traceable through the handwriting, style of expression, or the particular incidents related in the comments . . . [s]uch identifiable student comments would be excepted from required public disclosure under” the predecessor to section 552.114. *Id.* However, as you have not submitted any responsive evaluations to this office for our review, we are unable to determine whether any such handwritten evaluations would make the identity of students easily traceable. We therefore have no choice but to order such evaluations released, if they exist. We caution that the distribution of confidential information constitutes a criminal offense. Gov’t Code § 552.352. If you believe that the student evaluations are confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We next address your argument for withholding the submitted information. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103. The university has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The university must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated").

You have provided a letter to this office in which the requestor's attorney informs the university that he will represent the requestor as well as another professor in their claims against the university. The attorney states that, "if these matters can not be resolved within [a stated time frame], I will recommend to [the requestor] that she request a right to sue letter from the Texas Commission on Human Rights and file suit against the university administrators, as well." In addition, we note that in her letter to this office, the requestor states that "[t]he issues that would make up the core of any litigation in my case are violations of the Texas State Constitution and U.S. Constitution (First Amendment, Speech and Association Rights), and violations of Title VII of the Civil Rights Act of 1964 (sex

discrimination and retaliation for engaging in protected activity). I have filed a complaint with the EEOC and Texas Human Rights Commission for these violations. That is why my lawyer would recommend to me that I request my right-to-sue letter from the Human Rights Commission.”

The Texas Commission on Human Rights (the “TCHR”) operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission (“EEOC”) defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.* This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). From the information provided to this office, it appears that the requestor’s complaint was filed with the EEOC and the TCHR prior to the date on which the university received the request for information. Therefore, based on the totality of the circumstances, we conclude that the university reasonably anticipated litigation on the date it received the records request. Upon review of the submitted information, we conclude that the requested information is related to the litigation for purposes of section 552.103. Accordingly, we conclude that the submitted information may be withheld from the requestor under section 552.103 at this time.

We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public

records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/sdk

Ref: ID# 167785

Enc. Submitted documents

c: Ms. Kari Lavalli
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San Marcos, Texas 78666
(w/o enclosures)